



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

November 1, 1990

**Robert Bernstein, M.D., F.A.C.P.
Commissioner
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199**

LO-90-85

Dear Commissioner Bernstein:

Your questions generally relate to whether "retirement centers" that also provide or arrange for "home health services" must be licensed under chapter 242 of the Health and Safety Code. Chapter 242 provides for licensure and regulation by the Department of Health (hereinafter, the "department") of convalescent and nursing homes and related institutions (hereinafter "personal care institutions"). Generally speaking, facilities subject to chapter 242 are residential facilities which provide, in addition to food, shelter, and laundry, other services appropriate to the needs of their residents. See Health & Safety Code § 242.002(6) (defining which "institutions" are subject to chapter 242).

As you note, the provision of "home health services" is itself subject to licensure by the department under chapter 142 of the Health and Safety Code. Section 142.002 provides that a person "may not engage in the business of providing home health services without an appropriate license issued by the department for each place of business from which home health services are directed." Section 142.001, defining various terms used in chapter 142, provides in subsection (5) that "home health service" means "the provision, for pay or other consideration, of a health service in a patient's residence." See generally id. § 142.001(3) (defining "health service").

Subsection (8) of section 142.001 defines "residence" as "a place where a person resides and includes a home, a

nursing home, or a convalescent home for the disabled or aged."¹

The first of your questions we address is:

May licensed home health agencies provide services to persons residing at the same address as the home health agency?

Section 142.001(4) defines "home health agency" as "a place of business, including a hospice, that provides a home health service." We find nothing in chapter 142 or elsewhere in Texas law precluding a licensed home health agency from providing services to persons residing at the same address as the home health agency. Of course, there remains the issue, which you raise directly in your other questions, whether a licensed home health agency's provision of services to persons residing at the same address might trigger the application of the licensure and other requirements of chapter 242 for personal care institutions.

Your remaining questions are:

May a licensed home health agency in cooperation with a retirement center provide at a

1. The Health and Safety Code was adopted in 1989. Acts 1989, 71st Leg., ch. 678, at 2230. Section 142.001 of the code was derived from former V.T.C.S. article 4447u, section 1(2). Article 4447u was repealed by the 1989 act in section 13(1). However, section 1(2) of that article was amended by another act of the 71st legislature -- Acts 1989, 71st Legislature, chapter 1085 -- without reference to the article's repeal, to provide:

'Home health service' means the provision of a health service for pay or other consideration in a patient's residence but does not include the provision of care under an attendant care program administered by the Texas Department of Human Services.

Government Code section 311.031(c) provides, in part, that the repeal of a statute by a code does not affect an amendment of the statute by the same legislature which enacted the code and that the amendment is preserved and given effect as part of the code provision.

single location food, shelter, laundry, and health or personal care services without the retirement center being subject to licensure as an 'institution' as defined by Chapter 242, Health and Safety Code?

Does common ownership of the two entities (the home health agency and the retirement center) influence whether or not the retirement center is subject to licensure as an 'institution'?

Does the type of service (short term care versus unlimited long term care) or manner of service (common care staff providing services to multiple residents on an 'as needed' basis from or at a central work station) affect whether or not the retirement center is subject to licensure?

"Retirement center" is not a statutory term. We assume that by "retirement center" you mean a residential facility.² Whether a residential facility that in cooperation with a licensed home health agency provides -- in addition to food, shelter, and laundry -- health or other personal care services is subject to the chapter 242 licensure requirement for personal care institutions would depend on whether the facility falls within the definition of an "institution" in section 242.002(6) and is not otherwise exempt from the chapter's requirements. Section 242.002(6) includes in the definition of "institution"

(A) an establishment that:

2. We note that chapter 105 of the Human Resources Code provides for registration by the Department on Aging of board and lodging houses for senior citizens or disabled persons, but does not provide for licensure, inspections, or other regulation of such facilities. Section 105.002(1) provides that for purposes of chapter 105

'Board and lodging home for senior citizens or disabled persons' means an establishment that provides room and board to a total of four or more senior citizens or disabled persons unrelated to the proprietor.

(i) furnishes, in one or more facilities, food and shelter to four or more persons who are unrelated to the proprietor of the establishment; and

(ii) provides minor treatment under the direction and supervision of a physician licensed by the Texas State Board of Medical Examiners, or other services that meet some need beyond the basic provision of food, shelter, and laundry;

. . . .

(C) a foster care type residential facility that provides room and board to fewer than five persons who:

(i) are not related within the second degree of consanguinity or affinity to the proprietor; and

(ii) because of their physical or mental limitation, or both, require a level of care and services suitable to their needs that contributes to their health, comfort, and welfare.³

See also Health & Safety Code § 242.003 (exemptions).

It would appear that the provisions of subparts (A) and (C) of section 242.006(6) are relevant to your concerns about retirement centers. We discern the focus of your concerns to be whether the fact that the health care or

3. We note that section 2(a) of article 4442(c), V.T.C.S., a predecessor provision of section 242.002 that was repealed with the adoption of the Health and Safety Code in 1989, was amended at the same session. Acts 1989, 71st Leg., ch. 1085, § 9. Though the amendments are preserved as part of the code's provisions (see footnote 1), you neither point to, nor do we find, provisions in the amendment warranting separate treatment here. However, general references here to the requirements of chapter 242 of course include the provisions of such amendments.

provided at a residential facility through the "cooperation" of a licensed home health agency relieves the facility of the chapter 242 licensure requirement for personal care institutions.

We note that in adopting the provisions now in chapter 242 for licensure and regulation of personal care institutions, the legislature clearly intended that the physical facilities of such institutions, as well as the care-providing personnel, warranted regulation by the department. See Health & Safety Code §§ 242.001 (purpose of chapter), 242.037 (standards relating to construction, lighting, ventilation, plumbing and other housing conditions; sanitary and related conditions; requirements for personnel providing care to or having contact with residents), 242.039 (fire safety requirements). The provisions of chapter 142 regarding home health agencies, in contrast, do not appear to contemplate regulation by the department of the residential conditions of persons receiving their services, but are limited generally to such agencies' personnel matters, provision of treatment and services, organizational structure, financial condition, and record-keeping. Id. § 142.012.⁴

4. We note that the definition of home health agency in section 142.001, supra, includes a "hospice" and that section 142.007 provides that the department may licence an agency as a "hospice" if it "meets the standards adopted by the board [of health] for hospice services." See Acts 1985, 69th Leg., ch. 825, § 2, at 2883 (adding now section 142.007 providing for hospice-designation license); Acts 1983, 68th Leg., ch. 515, § 1 at 2984 (adding "hospice" to the definition of a home health agency in now section 142.001). The department has, by rule, defined "hospice service," in title 25, section 115.2, of the Texas Administrative Code, as "[a] specialized concept of care which uses an interdisciplinary approach to deliver medical, social, psychological, emotional, spiritual, and bereavement care to the terminally ill patient and the patient's family." Section 115.11 provides for the department's issuance of a license "designating that the agency provides hospice services." It is apparent that the hospice-designation license authorizes only provision of "hospice services" under the department's definition, and not the concomitant provision of housing services.

We do not think the legislature, in adopting the provisions now in chapter 242, contemplated that a residential facility could escape licensure and regulation under the chapter merely by contracting or otherwise arranging for provision of additional services, where direct provision "in cooperation with" a home health agency of such services would have brought the facility clearly within the ambit of chapter 242. We note that the section 142.001(8) definition of "residence" for purposes of chapter 142 specifically contemplates that the residence of a person receiving home health services may be in a nursing convalescent home, etc., which facility itself would be subject to licensure under chapter 242.

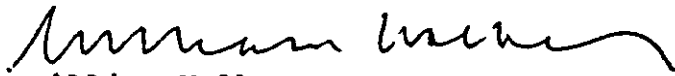
However, though "common ownership" of a retirement center and the cooperating licensed home health agency might suggest that additional services being provided by the agency were being provided by the center itself for purposes of the section 242.002(6) definition of an "institution" subject to licensure and regulation under the chapter, we do not think that either the presence or absence of "common ownership" would in itself be determinative of the issue. Other factual considerations such as the actual arrangements between the center and the agency for the latter's provision of services, the understandings of the residents regarding the provision and availability of such additional care, etc., would also be relevant. If, for example, a retirement center's only involvement with the provision of additional care was the posting of a home health agency's business card informing residents of services available through the agency, it is conceivable a court would find that the retirement facility itself was not thereby brought under the section 242.002(6) definition of an institution, even if the facility and the agency were commonly owned.

Regarding whether the "type" of care provided ("short term care versus unlimited long term care") would affect whether the center was subject to licensure, we think that the definitions of institutions subject to licensure in section 242.002(6) on their face indicate that any type of additional care provided, whether long-term or short term -- if it "meets some need beyond the basic provision of food, shelter, and laundry" or is "foster care" suitable to the needs of persons with physical or mental limitations -- would, if the facility were otherwise within the provisions of chapter 242, bring it under the definition of an "institution" subject to licensure.

As to the "manner" of care, while we think that presence of a "common care staff providing services to multiple residents . . . from or at a central work station" would tend to indicate that the retirement center is itself providing the additional care and thus within the section 242.002(6) definition of an "institution" subject to licensure, we do not think that the absence of such an integrated apparatus for provision of additional care would in itself take the facility out of the section 242.002(6) definition of a personal care "institution." The issue is, again, whether the facility is, in fact, providing any services meeting some need beyond the basic provision of food, shelter, and laundry, or providing foster care suitable to the needs of persons with physical or mental limitations.

We cannot anticipate every factual situation that might arise. Resolution of the issues you present must ultimately be done on a case-by-case basis.

Very truly yours,



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Ref.: RQ-2041
ID# 9843